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Supreme Court of the United States

OCTOBER TERM, 1950.

No. 195.

BLANCHE A. HOWARD, PETITIONER,

VS.

UNITED STATES OF AMERICA.

ON PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITIONER'S SUPPLEMENTAL REPLY TO SUGGESTIONS THAT CAUSE HAS BECOME MOOT.

ROY ST. LEWIS,
National Press Building,
Washington, D. C.,
IRA B. McLAUGHLIN,
600 National Fidelity Life Building,
Kansas City, Missouri,
Attorneys for Petitioner.

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FOREWORD AND OPINION BELOW.

Consideration is respectfully requested of the following suggestions. The belated receipt of the suggestions filed by the Solicitor General precluded the preparation and presentation hereof at an earlier date.

The within opinion of the United States Court of Appeals is now reported in 182 Fed. (2d) 908.

SUGGESTIONS OF PETITIONER.

The case, we submit, is not moot because:

I.

The final affirmance of the within judgment will preclude petitioner from establishing, in another proceeding, facts vital to her interests; that is to say, it will preclude her, in the criminal contempt proceeding now pending (R. 156-163), **from establishing that her testimony in question is not contemptuous.**

The two presentments, *i. e.*, the one charging civil contempt (R. 6-12) and the one charging criminal contempt (R. 156-163), involve the same subject-matter.

Ford Motor Co. vs. *U. S.*, 69 S. Ct. 93; 335 U. S. 303.

F. Burkhardt Mfg. Co. vs. *Case*, 39 Fed. (2d) 5.

Howard vs. *Wilbur*, 166 Fed. (2d) 884, 886.

Kaufman vs. *Mastin*, 66 W. Va. 99; 66 S. E. 92; 25 LRA (NS) 855, 859.

Young Inv. Co. vs. *Reno Club*, 208 Pac. (2d) 297, 298 (Nev.).

Morrison vs. *Hess*, 231 S. W. 997 (Mo. Sup. *en banc*).

City of Plankinton vs. *Kieffer*, 13 N. W. (2d) 298 (S. D.).

Moore vs. *Smith*, 160 Pac. (2d) 675 (Kan.).

If this case is ruled to be moot and the within petition for certiorari is denied the issue here involved of contempt *vel non* will thereby be foreclosed.

In this connection, one of the issues in this cause is whether or not the testimony of petitioner, which was ruled contemptuous *nisi*, is analogous to the testimony which was ruled not to be contemptuous in the two controlling decisions of this court, viz.:

In Re Michael, 66 S. Ct. 78, 80; 326 U. S. 224.
Ex parte Hudgings, 39 S. Ct. 337; 249 U. S. 378.

In the *Ford case, supra*, this court said:

> "Although the particular extension of paragraph 12 appealed from has expired, the equity suit against General Motors has not yet been set down for trial and the Government's motion for a further extension has been held in abeyance pending the outcome of these appeals. It is not a moot question, therefore, whether the District Court properly granted the extension of January 1, 1947."

In the *Burkhardt Mfg. Co. case, supra*, the court said:

> "If the judgment of the trial court should be left unreversed, appellant would be precluded as to facts vital to its rights. That being true, it is not merely a moot question."

Kaufman vs. *Mastin, supra*, was a case of unlawful detainer. Pending appeal, Mastin, the defendant *nisi* and plaintiff in error above, vacated the premises involved. There the Supreme Court of West Virginia said:

> "Whenever a case involves rights vital as between the parties, it is not a moot case. If the writ of error is dismissed, the judgment which says Mastin was unlawfully in possession is left in force. Then Kaufman may recover a much larger sum per month than the rent stipulated in the lease. Without decision we would thereby preclude Mastin in a matter of live issue, reserved in this very record."

In the case of *Young Investment Co.* vs. *Reno Club, supra*, the Supreme Court of Nevada thus states the rule:

> "The rule is well established that a judgment, if affirmed, may not be enforced because of change of circumstances pending appeal, yet, the subject matter

is not moot, if the judgment, if left unreversed, precludes the party against whom it stands as to a fact vital to his rights."

II.

Where, as here, an issue vital to the interest of a party is not settled, the case is not moot, although there is a change of status.

Porter vs. *Lee*, 66 S. Ct. 1096; 328 U. S. 246.

Burton vs. *Carey*, 82 Fed. (2d) 657.

Cramer vs. *Phoenix Mut. Life Ins. Co.*, 91 Fed. (2d) 141, 145; cert. den., 302 U. S. 739; 58 S. Ct. 141.

Jackson vs. *Denver Production & Ref. Co.*, 96 Fed. (2d) 457.

In the case at bar, we submit, the issue of contempt *vel non* is not settled.

III.

A case is not moot where, as here, interests of a public character are asserted under conditions that may be immediately repeated, merely because the time for a particular order has expired.

Southern Pac. Term. Co. vs. *Interstate Commerce Com.*, 219 U. S. 498; 31 S. Ct. 279; 55 L. Ed. 310.

Landsen vs. *Hart*, 180 Fed. (2d) 679.

Morris vs. *Williams*, 149 Fed. (2d) 703.

Peppers Refining Co. vs. *Corporation Commission*, 179 Pac. (2d) 899, 901 (Okla.).

Van De Vegt vs. *Board of Commissioners*, 98 Colo. 161; 35 Pac. (2d) 703, 710.

Culver vs. *City of Warren*, 83 N. E. (2d) 82, 90-92 (Ohio).

In the *Culver case, supra*, the Supreme Court of Ohio said:

> "A determination of this suit and a dismissal of the appeal on the ground that the question is now moot would undoubtedly lead once again to the same method and pattern of exclusion and the process of discrimination could again be set in motion. If another suit were commenced, it is easily conceivable and quite probable that by the time it would again reach a reviewing court it would again be argued that the matter was moot for the same reasons and on the same grounds."

1. If, in the case at bar, the case is ruled to be moot and the live issue of contempt *vel non* is foreclosed, the following unwholesome results can occur:

A grand jury is now in session in the trial court and, at frequent intervals, other grand juries will be in session in that court. Petitioner can be required, by subpoena, to appear before one or more of these grand juries. She can there again be questioned concerning the subject-matter of her within testimony. If she again testifies to substantially the same facts, on the authority of the decision here sought to be reviewed, she can again be imprisoned for the term of that grand jury. This procedure can be repeated *ad infinitum*, as each successive grand jury is impaneled.

Manifestly, an interest of a public character is involved and the live issue of whether the decision here sought to be reviewed contravenes the *Hudgings* and *Michaels* cases should be considered.

2. The judgment in the case at bar (R. 15) is identical, in all material respects, with the judgment ruled void in the *Hudgings case, supra*. The order there considered was held to have been made under an erroneous concep-

tion of the contempt power. In the *Hudgings case* this court said that

> "* * * the dangerous effect on the liberty of the citizen when called upon as a witness in a court, which might result if the erroneous doctrine upon which the order under review was based were not promptly corrected * * *"

justified the ruling made there by this court in a proceeding for habeas corpus.

It is respectfully submitted that the Writ of Certiorari prayed herein should be granted, to the end that the rules of law controlling the "liberties of a citizen when called upon as a witness in a court" be preserved and stabilized.

Respectfully submitted,

ROY ST. LEWIS,
National Press Building,
Washington, D. C.,
IRA B. MCLAUGHLIN,
600 National Fidelity Life Building,
Kansas City, Missouri,
Attorneys for Petitioner.